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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. REGAL ROBINSON, Defendant and Appellant.	D036698 (Super. Ct. No. SCD149278)

APPEAL from a judgment of the Superior Court of San Diego County, Albert T. Harutunian, III, Judge. Affirmed.

In a second amended information filed in March 2000, the San Diego County District Attorney charged defendant and appellant Regal Robinson with forcible rape under Penal Code[1] section 261, subdivision (a)(2) (count 1), forcible sodomy under section 286, subdivision (c)(2) (count 2), rape by a foreign object under section 289,

1 All further statutory references are to the Penal Code unless otherwise specified.

subdivision (a) (count 3), and furnishing cocaine base under Health and Safety Code section 11352, subdivision (a) (count 4). As to counts 1 through 3 the People also alleged under section 667.61, subdivisions (a) through (e) that Robinson came within the meaning of the one strike law because he had previously been convicted of rape and because he committed the current offenses against more than one victim. Robinson was also charged with three prison priors under section 667.5, subdivision (b), two serious felony priors under section 667, subdivision (a)(1), and five strike priors under section 667, subdivisions (b) through (i).

Prior to trial, the court granted Robinson's request to represent himself at trial.[2] A jury trial commenced in April 2000. On April 26, 2000, the jury convicted Robinson of all four counts and found true the multiple victim allegations on counts 1 through 3. On April 27, 2000, Robinson admitted the remaining allegations.

In May 2000 Robinson filed a motion for new trial. In August 2000 Robinson amended his motion for new trial to include a claim that the People failed to turn over exculpatory pretrial discovery, specifically the entire paramedics report of their treatment of one victim. In September 2000, the court denied Robinson's motion.

In September 2000 the court sentenced Robinson to a term of 186 years to life. The sentence consisted of terms of 75 years to life on counts 1 through 3 and a term of 25 years to life on count 4, with the sentences on all counts to run consecutively, with the

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2 Robinson is represented by counsel on this appeal.

exception of the sentence on count 3, which was to run concurrently.[3] The court added two consecutive five-year terms under section 667, subdivision (a)(1), and a one-year term under section 667.5, subdivision (b). Robinson timely appealed.

On appeal, Robinson contends that the judgment must be reversed because: (1) the court erred when it denied his *Wheeler/Batson*[4] motions asserting racial discrimination in the People's use of two peremptory challenges to excuse two Black jurors; (2) the court improperly allowed evidence of a prior sex offense that created the perception that he had a disposition to commit the charged crimes and lowered the People's burden of proof; and (3) the court utilized jury instructions that permitted use of propensity evidence to prove the charged offenses violated his rights under the state and federal Constitutions to have his guilt established beyond a reasonable doubt.

Robinson also asserts the judgment must be reversed because: (1) the evidence at trial was insufficient to support findings of guilt on all counts; (2) the court erred when it permitted the People to impeach Robinson's testimony with prior felony convictions for assault with a deadly weapon and robbery; and (3) Robinson's due process rights were

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3 The propriety of this type of sentence and other related issues is currently pending before our Supreme Court in several cases, including *People v. Cornelius* (2000) 79 Cal.App.4th 771, review granted July 26, 2000, S068743; *People v. Acosta* (2000) 80 Cal.App.4th 714, review granted August 23, 2000, S089120; *People v. Graves* (2000) 80 Cal.App.4th 1336, review granted August 23, 2000, S089533; and *People v. Diaz* (2000) 82 Cal.App.4th 503, review granted November 1, 2000, S091158. However, Robinson does not challenge the propriety of his sentence on this appeal.

4 *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

violated because the People presented testimony that was false and withheld exculpatory evidence from Robinson. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *People's Case*

Furnishing cocaine base (count 4)

On the evening of November 27, 1999,[5] Brenda A. and Robinson were at Eric Gordon's "dope house" near 19th and Market Streets in downtown San Diego. Robinson told Brenda A. he had been out of prison for about a week and wanted sex. Brenda A., a prostitute and drug user,[6] agreed to have sex with Robinson in exchange for $10 and some rock cocaine offered by Robinson. At about 10 p.m., Brenda A. and Robinson went to a grassy area on the campus of San Diego City College. They smoked a piece of rock cocaine supplied by Robinson. Brenda A. orally copulated Robinson and they then had consensual sex. They smoked some more of Robinson's rock cocaine and parted on friendly terms.

Assault on Georgia T. (count 1)

Robinson went back to Gordon's drug house and encountered Georgia T. Robinson and Georgia T. later left and went to a hill near the on-ramp to Interstate 5 and the intersection of E and 16th Streets. While they were sitting and talking on the hill

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5 All further reference to dates are to the calendar year 1999 unless otherwise specified.

6 Brenda A. admitted using heroin on the night of November 27. She also gave a urine sample on November 28 that tested positive for cocaine and heroin.

Robinson suddenly began hitting Georgia T. in the head. Georgia T. fought back but Robinson choked her until she passed out. When she came to she discovered that her clothes had been removed. Georgia T. tried to escape but Robinson caught her, hit her and choked her again and forced her face into the dirt. Robinson then raped her.

After being raped, Georgia T. was able to escape by rolling down the hill to the freeway on-ramp. Robinson pursued her and resumed choking and punching her. A car approached and slowed down and Georgia T. asked for help. Robinson told the people in the car, "She's okay. She just fell down the freeway." The car then left, and Robinson started dragging Georgia T. on the freeway on-ramp.

A taxi approached Robinson and Georgia T. shortly after midnight. The taxi driver saw Robinson and Georgia T. struggling. Georgia T. was nude and bleeding from her mouth. Georgia T. got in front of the cab, laid her body on the hood and yelled for help. Robinson fled when a passenger said something about apprehending him.

The taxi driver called the police, who arrived 20 minutes later. One of the taxi's passengers tended to Georgia T. She was going in and out of consciousness and was bleeding from multiple wounds.

The police arrived and took Georgia T. to Belleview Hospital where she was examined. Georgia T.'s jaw was swollen and she had scratches, abrasions and bruises all over her body. Her right hip was red and swollen. She complained that her head was sore to the touch. She also had dirt and debris on her body. Her wounds appeared to be recent. There were no injuries to Georgia T.'s vaginal area and there were no visible

choke marks on her neck. Georgia T. told the examining nurse that she had consensual sex on November 27 with a man prior to being raped by Robinson.

Assault on Brenda A. (counts 2 and 3)

Brenda A. saw Robinson again later on the night of November 27. Brenda A. was "working prostituting" at the intersection of Market and 16th Streets. Robinson approached, accompanied by a man named Ronnie. Ronnie later left. Robinson called to Brenda A. and she walked over to him. Robinson asked if she had a pipe and Brenda A. replied that she did. They walked to the loading dock behind a Chinese market where Robinson planned to smoke some rock cocaine. Once there, Brenda A. handed Robinson her pipe and lighter. Robinson put the pipe in his pocket. Brenda A. asked him what he was doing and Robinson "copped an attitude." Brenda A. told Robinson the pipe was not that important, he could keep it and she turned away to leave.

Robinson then hit Brenda A., placed his hand over her mouth and began choking her. Robinson told her that he was going to remove his hand and that she better not scream. Robinson slammed Brenda A.'s face into a dumpster and told her to remove her clothes. Brenda A. complied and Robinson forced her to the ground. Robinson commanded her to wet her anus and then spit on his own finger and touched her anus. Robinson then put his penis inside her rectum. Robinson ejaculated inside of her.

Thereafter, Robinson became apologetic, saying, "Damn, why do I do these things." Robinson also said, "Oh baby. I'm sorry. I don't know what came over me." Brenda A. was crying and Robinson hugged her.

Robinson and Brenda A. then walked back to Gordon's house. Brenda A. thought about escaping but waited until she felt that it was possible. Once at Gordon's residence, Brenda A. gave Robinson $15 to buy rock cocaine and then left. She returned to Gordon's residence early that morning. Robinson was not there when she arrived, but showed up later. Police raided Gordon's residence at approximately 6:30 a.m. on an unrelated narcotics search.

Brenda A. saw Gordon later in the day and started crying. Brenda A. told Gordon what Robinson had done. Gordon then called the police at approximately 10:00 a.m.

Brenda A. was taken to Villa View Hospital that morning and was examined by a sexual assault nurse. The nurse found superficial tears on the exterior of Brenda A.'s rectum. Blood-tinged mucous was found inside her rectal canal. Brenda A. complained of pain in her throat. Her injuries were consistent with nonconsensual sodomy. Brenda A.'s description of her assault by Robinson to the nurse was consistent with her testimony at trial.

Robinson's Arrest and Medical Examination

The San Diego Police Department received a rape report from Gordon at approximately 10:00 a.m. on November 28. Brenda A. then identified Robinson at a curbside lineup as the person who assaulted her.

A sexual assault nurse examined Robinson. He had bruising above his chest, which appeared recent. The nurse also observed multiple abrasions and open wounds, with fresh, dried blood on both knees, scrape marks on both elbows and abrasions and scratches on his right wrist. Robinson also had several scratch marks down his back. He

had open wounds on his right foot. Robinson also had scratches on the right side of his neck, and dirt and debris on his clothing.

Evidence of 1981 Assault

Over Robinson's objection, the People sought to present evidence that he had committed a sexual assault in 1981 for which he was convicted. Robinson objected to the evidence as remote, unnecessary and prejudicial. Further, Robinson offered to stipulate to the fact of the prior conviction to avoid having the victim testify to the facts underlying that assault.

The court allowed the evidence, including the facts surrounding the assault, reasoning that it was admissible under Evidence Code section 1108,[7] and was not subject to exclusion under Evidence Code section 352[8] as being more prejudicial than probative.

The evidence presented concerned the rape of Sheila W. in 1981 in her apartment in Imperial Beach. In May 1981, Sheila W. let Robinson, whom she knew to be a former

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7 Evidence Code section 1108 provides in part: "(a) in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352. [¶] . . . [¶] (d) As used in this section, the following definitions shall apply: [¶] (1) 'Sexual offense' means a crime under the law of a state or of the United States that involved any of the following: [¶] (A) Any conduct proscribed by Section . . . 288 . . . of the Penal Code. [¶] (B) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person."

8 Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

resident of her complex, into her apartment. Robinson had asked to talk to her. Once inside, Robinson asked to talk privately with her in her bedroom.

When they got to Sheila W.'s bedroom, Robinson struck her on the right side of her head, knocking her down. Robinson told her not to scream or he would hurt her again. Robinson told Sheila W. to take off her clothes, which she did. Robinson undressed and put his penis in her vagina.

Robinson then told Sheila W. to perform oral sex on him. Robinson then put his penis in her anus. Robinson told Sheila W. he needed to clean himself and went into the bathroom. Sheila W. dressed and went into the living room. Robinson came into the living room and told her that he would like to come back sometime as a friend. He also told her that if she told anyone, he would hit her. Robinson then left. Robinson was convicted of the rape of Sheila W. in 1982.

B. *Defense Case*

Robinson testified in his defense. He stated that he was released from prison on November 27. He wanted sex and arranged to have sex with Brenda A. in exchange for some rock cocaine. He and Brenda A. smoked the rock cocaine and then had both vaginal and anal sex.

While he was back at Gordon's house at about 2:00 a.m., preparing to smoke another piece of "rock," Georgia T. approached him. She stated that she needed to make some money. They walked past 17th Street and Market. Robinson fell on the way and skinned his knee. Robinson then sat next to a stump and Georgia T. pulled down her pants.

Robinson broke off a piece of rock cocaine for Georgia T., put it in the pipe and Georgia T. took a hit. After awhile, Robinson asked for the pipe back, but Georgia T. said nothing. When he asked again, she refused to return it. When Robinson tried to pry the pipe from her hands, she tried to bite him. Robinson swung his hand up and hit Georgia T. in the face. Georgia T. fell down by the stump and Robinson grabbed the pipe from her hand. Georgia T. tried to get up but fell down the hill. Robinson grabbed her, but also fell down the hill. Robinson lost one shoe and broke his glasses.

At the bottom of the hill, Robinson tried to pull Georgia T. up, but she would not cooperate. A cab approached, stopped and asked what was happening. Robinson explained that it involved drugs and he would take care of it. Suddenly, Georgia T. jumped on the hood of the car and yelled for the police. Robinson left because he had just been released from prison and was in possession of drugs.

Robinson returned to Gordon's house, took Gordon's shoes, and then went to a halfway house and slept for a few hours. He woke at approximately 6:15 a.m. and returned to Gordon's residence. He was there when police raided the house at 6:30 a.m. Later that day, Robinson was arrested.

In support of an alibi defense for the rape of Brenda A., Robinson presented the testimony of the man who let him sleep at the halfway house. The witness stated that Robinson arrived at the house between 2:00 and 3:00 a.m. and left at 6:00 a.m. Although the witness recalled this occurred on a weekend, he could not recall the date.

Forensic test results revealed that sperm found on swabs of Georgia T.'s internal and external vaginal areas excluded Robinson as the source. Forensic testing also

eliminated Georgia T. as a source of DNA on Robinson's penile swab. DNA found under Georgia T.'s fingernails could have had been from Georgia T. and Robinson. Sperm collected from swabs of Brenda A.'s anus were consistent with Robinson's DNA.

A pastor offered character evidence that when he knew Robinson, he was a changed man.

On cross-examination, Robinson admitted smoking rock cocaine with Brenda A. and Georgia T. Robinson also admitted the prior rape conviction, as well as prior convictions for forgery, robbery and assault.

C. *People's Peremptory Challenge of Two Black Jurors*

Juror L. P., a Black man living in Southeast San Diego, worked as a maintenance technician for the City of San Diego at a water treatment plant. His wife worked in customer service for Aetna Health Care. He had three children, ages nine, five and two. L. P. had never served on a jury before and had no friends or relatives in law enforcement.

The People exercised a peremptory challenge as to L. P. and Robinson objected on the basis that the challenge was improperly based upon race. Robinson based his objection to the People's peremptory challenge on the basis that (1) L. P. answered all questions fairly; (2) he did not seem to have any bias; and (3) he was a "Black man." The People responded by noting that the peremptory challenge to L. P. was the 11th challenge exercised, and the previous challenges had fallen across all ethnic and gender lines. The court then found that Robinson had made a prima facie case of group bias as to the

People's exercise of a peremptory challenge to L. P. since L. P. was the only Black juror that had been challenged to that point, and asked the People to justify the challenge.

The prosecutor stated that she believed L. P.'s family had been involved in criminal activities in San Diego for a couple of generations. Because of this, the People did not believe L. P. could be fair and impartial and uphold the law. The court found that since the People had provided a nondiscriminatory reason for the challenge, Robinson's *Wheeler/Batson* motion failed.

Juror William D., also a Black man who lived in Southeast San Diego, was a retired truck driver. He was divorced and had five children. William D.'s son pleaded guilty to rape in 1996 and, because he had two prior offenses, he was sentenced to a prison term of 85 years to life. The People exercised a peremptory challenge and removed him from the jury. Robinson responded with a *Wheeler/Batson* motion.

The People stated that they exercised a peremptory as to William D. because, by virtue of his son's conviction on a rape charge, he was "much too closely connected to the situation." The court found that the People had exercised the peremptory challenge of William D. for a nondiscriminatory purpose and denied Robinson's *Wheeler/Batson* motion.

DISCUSSION

A. *Wheeler/Batson Motion*

"'It is well settled that the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates both the state and federal Constitutions.' [Citations.]" (*People v. Box*

(2000) 23 Cal.4th 1153, 1187 (*Box*); *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson*, *supra,* 476 U.S. at p. 89.) "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court." (*Wheeler*, *supra*, 22 Cal.3d at p. 280.) "To establish a prima facie case, a party must make as complete a record as the circumstances permit, must establish that the challenged prospective jurors are members of a cognizable group, and must show a 'strong likelihood' that they were challenged because of their group association. [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 723 (*Mayfield*).)

Once a prima facie showing has been made, the burden shifts to the prosecutor to show the challenges were not based on group bias. (*Wheeler*, *supra*, 22 Cal.3d at p. 281.) The prosecutor must satisfy the court that he or she exercised the peremptory challenge on grounds that were reasonably relevant to the issues, parties, or witnesses in the particular case on trial. (*Id.* at p. 282.) "[A]dequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias and not simply as 'a mask for race prejudice' [citation]." (*People v. Williams* (1997) 16 Cal.4th 635, 664.) Moreover, we presume that a prosecutor uses his or her peremptory challenges in a constitutional manner. (*People v. Ayala* (2000) 24 Cal.4th 243, 260.)

We review the court's ruling on a *Wheeler/Batson* motion for substantial evidence. (*People v. Jones* (1998) 17 Cal.4th 279, 293 (*Jones*).) Further, because *Wheeler/Batson*

motions call upon a trial judge's personal observations, we view the ruling with "'considerable deference'" on appeal. (*People v. Howard* (1992) 1 Cal.4th 1132, 1155 (*Howard*).) If the record "'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm." (*Id.* at p. 1155.)

Robinson asserts that the court erred in allowing the People's peremptory challenge of L. P. because, when the People argued that his family had been involved in criminal activities without any support in the record, the court had a duty to make a further inquiry to determine if the People's position was supported by the evidence. We agree that the court should have conducted further inquiry to determine if there was any evidence to support this assertion, given that the People's justification for exercising a peremptory challenge to L. P. found no support in the record. "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People v. Silva* (2001) 25 Cal.4th 345, 386.) We conclude, however, that any error by the court in failing to make further inquiry related to the People's challenge of L. P. was harmless because Robinson failed to make a prima facie showing in the first instance that the People's challenge of jurors L. P. and William D. were racially motivated.[9]

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9 Robinson also asserts the court should have conducted a further inquiry into the People's reason for excusing juror William D. However, since the proffered reason, his

As to both juror L. P. and juror William D., the sole reasons given by Robinson in support of his *Wheeler/Batson* motions were that they were the only Black men on the panel, showed no evidence of bias, and Robinson was also Black. Based upon these grounds, the court found that Robinson had made a prima facie case of discrimination. This finding, however, was erroneous.

A party attempting to make a prima facie case of group bias in the exercise of peremptory challenges must demonstrate a strong likelihood that the prospective jurors were excused because of their race. (*People v. Welch* (1999) 20 Cal.4th 701, 745.) Simply stating that all members of a cognizable class have been excused is not enough to make a prima facie case of discrimination. (*Box, supra,* 23 Cal.4th at pp. 1188-1189.) This is so even where the prosecution excuses the only members of a cognizable group from the panel. (See *Jones, supra,* 17 Cal.4th at p. 293 [no prima facie case of group bias in peremptory challenges of four Black jurors leaving no Black jurors on panel]; *People v, Christopher* (1991) 1 Cal.App.4th 666, 672-673 [challenge of one or two prospective jurors of same racial or ethnic group as defendant, even when panel contains no other members of group, does not establish prima facie case unless there is other significant supporting evidence].) Here, "the only bases for establishing a prima facie case cited by [Robinson] were that all of the challenged prospective jurors were Black and either

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son's conviction on a rape charge did appear in the record, the court was not required to make further inquiry. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1282-1283.)

indicated that they could be fair and impartial or in fact favored the prosecution. This is insufficient." (*People v. Turner* (1994) 8 Cal.4th 137, 167.)

Here, in raising his objection to the peremptory challenge of juror L. P., Robinson stated, "He answered all the questions fairly; didn't seem to have any bias. But in addition he was a Black man . . . . [H]e was the only Black out of 40 people basically that we have called so far." The court found that Robinson had made a prima facie case solely on the basis that L. P. was "the only Black juror who [had] been challenged . . . ." As to juror William D., Robinson argued that "like me [William D.] is Black. There are not more Black jurors on this panel." Robinson also argued that juror William D. "told all of us that he could be fair to both sides and had no biases . . . ." The People did not contest the fact that Robinson had made a prima facie showing as to juror William D. The court found that Robinson made a prima facie case showing on his *Wheeler/Batson* motion.

As controlling authority demonstrates, this evidence was insufficient as a matter of law to make a prima facie case of discriminatory exercise of peremptory challenges by the People. Indeed, Robinson does not dispute the fact that his reasons were insufficient or that the court used the wrong legal standard in finding a prima facie case. Rather, Robinson raises two procedural bars to this court finding that no prima facie case was made.

First, Robinson asserts that as to both juror L. P. and William D., the People waived the right to claim error as to the court's finding a prima facie case of

discrimination because the prosecutor did not specifically object at the time that the court was using the wrong standard to find a prima facie case. We reject this contention.

First, as to juror L. P., the People did argue that Robinson had not made a prima facie case of discrimination. This objection was sufficient to preserve their right to argue on appeal that no prima facie case was made on this *Wheeler/Batson* motion even though the People did not specifically point out to the court the proper standard in assessing a prima facie showing. (*Leibman v. Curtis* (1955) 138 Cal.App.2d 222, 225 [denial of plaintiff's challenge of juror for prejudice preserved for review on appeal by original challenge; plaintiff need not repeat his position after court denied challenge].) Further, as the adequacy of Robinson's prima facie showing of discrimination as to both juror L. P. and juror William D. is a question of law to be applied to undisputed facts, we may resolve this issue on appeal even without a proper objection being made at the trial court level. (*People v. Carr* (1974) 43 Cal.App.3d 441, 444-445.)

Further, even assuming that the People, by acquiescing in Robinson's prima facie showing as to juror William D., waived the right to argue on appeal that no prima facie showing was made as to this juror, a reversal would not be required. The People's explanation for excusing juror William D., that his son was convicted of rape and was serving an 85-year-to-life term, was sufficient to warrant a denial of Robinson's *Wheeler/Batson* motion as to this juror. (See *People v. Garceau* (1993) 6 Cal.4th 140, 172.)

Robinson also asserts that the People cannot argue on appeal that no prima facie showing was made because the court at trial found that such a showing *was* made.

Apparently, Robinson contends that while we may review the propriety of a court's ruling that a prima facie case was *not* made, we cannot review the correctness of a court's finding that such a showing *was* made. This unsupported assertion is unavailing.

While it is true that we view a court's ruling on a *Wheeler/Batson* with "'considerable deference'" on appeal (*Howard, supra,* 1 Cal.4th at p. 1155), this does not mean that we can never review a court's determination that a defendant has made a prima facie case, especially where, as here, the undisputed facts demonstrate as a matter of law that no such showing was made. There is no logical reason that a court of appeal may, as Robinson recognizes, review a court's determination that no prima facie showing was made (See *People v. Davenport* (1995) 11 Cal.4th 1171, 1200-1201) and not also review a trial court's determination that such a showing was made. Because the undisputed evidence demonstrates that Robinson did not make a prima facie showing of discrimination in the People's peremptory challenges to jurors L. P. and William D., we need not address whether the court conducted an adequate inquiry into the People's justifications for challenging these jurors, and we conclude that the court did not abuse its discretion in denying Robinson's *Wheeler/Batson* motion. (*Id.* at p. 1201.)

B. *Evidence of Uncharged Offense*

Robinson contends that the court abused its discretion in admitting evidence under Evidence Code section 352[10] and 1108[11] of his 1982 rape conviction. We reject this contention.

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10 See footnote 8, *ante.*

1. *Standard of Review*

The court's exercise of discretion in deciding whether to admit or exclude evidence under the terms of Evidence Code section 352 (see fn. 8, *ante*) will not be disturbed on appeal "'except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124, italics omitted.)

2. *Analysis*

Evidence Code section 1108 provides in part:

> "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense is not made inadmissible by Section 1101,[12] if the evidence is not inadmissible pursuant to Section 352.
>
> ". . . . . .
>
> "(d) As used in this section, the following definitions shall apply:
>
> "(1) 'Sexual offense' means a crime under the law of a state or of the United States that involved any of the following:
>
> "(A) Any conduct proscribed by Section . . . 288 . . . of the Penal Code.

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11 See footnote 7, *ante*.

12 Evidence Code Section 1101, subdivision (a) provides: "Except as provided in this section and Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

> "(B) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person."

In *People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*), the California Supreme Court noted that Evidence Code section 1108 was enacted to expand the admissibility of propensity evidence in sex cases. The high court in *Falsetta* also explained the standards to be applied in assessing the admissibility of evidence of prior sex crimes under Evidence Code section 1108: "By reason of [Evidence Code] section 1108, trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under [Evidence Code] section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra,* 21 Cal.4th at pp. 916-917.)

For example, in *People v. Callahan* (1999) 74 Cal.App.4th 356, 359-360 (*Callahan*), the defendant was convicted of committing a lewd and lascivious act on his nine-year-old daughter as a result of him putting his hand down the child's pants and rubbing her vaginal area. During the trial, the court allowed the testimony of a female

witness that when she was 12 years old, she woke up one night and the defendant was on top of her touching her breasts and vagina with his hands. (*Id.* at p. 362.)

The Court of Appeal rejected the defense contention that the trial court abused its discretion in allowing this testimony under Evidence Code sections 1108 and 352. The court first noted that the testimony was brief and to the point, and there was no substantial danger of undue prejudice as the prior act was not more inflammatory than the charged crime. (*Callahan, supra,* 74 Cal.App.4th at pp. 368-371.) The court also noted that the jury was never told, one way or the other, the legal outcome of the prior incident. (*Id.* at p. 371.) Finally, noting that the jury was instructed as to how they were to consider this evidence, there was no danger that the evidence would unduly confuse the jury. (*Id.* at p. 372.)

Similarly, in *People v. Waples* (2000) 79 Cal.App.4th 1389, 1391-1392 (*Waples*), the defendant was convicted of kidnapping a minor to commit a lewd and lascivious act and eight counts of committing lewd and lascivious acts on a minor, based upon acts occurring in 1995. The prosecution presented evidence of prior acts of molestation occurring as far back as 1970. (*Id.* at p. 1393.) In affirming the trial court's allowance of this evidence, the Court of Appeal first noted, as did the court in *Callahan,* that the prior acts were not any more inflammatory than the charged molestations. (*Id.* at p. 1395.) The court also concluded evidence of the prior acts was highly relevant to combat the defendant's strategy of painting his accuser as a liar or mistaken. (*Ibid.*) The court also held that the fact the prior acts were committed 20 years prior did not render them too remote, and, in any event, their similarity to the charged crimes "balanced out the

remoteness." (*Ibid.*) Finally, the court held that the jury would not be overly confused as it was not told that the defendant had not been punished for the prior acts. (*Ibid.*)

Here, the court also acted within its considerable discretion in allowing the testimony of Sheila W. concerning Robinson's rape of her in 1981. First, the prior act here was not overly remote. (*Waples, supra*, 79 Cal.App.4th at p. 1395.) Additionally, Sheila W.'s testimony was not overly prejudicial as it was short and to the point, and the described event was not more inflammatory than the charged offenses. The prior act was also sufficiently similar (beating, rape and sodomy) to make it probative. Robinson's contention that the prior rape was overly prejudicial because it was more violent than the charged offenses is not supported by the record. Both the prior offense and the charged offenses had the same level of violence. Finally, the jury was instructed under CALJIC No. 2.50.01 (discussed, *post*) as to how they could use this evidence. The court's admission of testimony concerning Robinson's prior rape conviction was not error.

C. *Constitutionality of Evidence Code section 1108*

Robinson asserts that Evidence Code section 1108 is unconstitutional as it violates his due process rights. However, in *Falsetta*, *supra*, 21 Cal.4th at page 917, the California Supreme Court specifically rejected a challenge to Evidence Code section 1108 on due process grounds. In reaching this conclusion the high court stated that "the trial court's discretion to exclude propensity evidence under [Evidence Code] section 352 saves [Evidence Code] section 1108 from defendant's due process challenge. . . . '[Evidence Code] section 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair

trial. Such evidence is still subject to exclusion under . . . [Evidence Code] section 352. [Citation.] By subjecting evidence of uncharged sexual misconduct to the weighing process of [Evidence Code] section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. [Citation.]'" (*Falsetta, supra,* 21 Cal.4th at p. 917.) As we stated in *People v. Carroll* (1996) 47 Cal.App.4th 892, 896: "Our task is simple: we will apply the law as the Supreme Court has stated it."

D. *Instruction under CALJIC No. 2.50.1*

Robinson contends that the court erred in instructing the jury under CALJIC No. 2.50.01, asserting it improperly allows juries to convict based upon propensity evidence, in violation of the due process clause of the California and United States Constitutions. We reject this contention.

The court instructed the jury under CALJIC No. 2.50.01 (1999 rev.) as follows:

> "Evidence has been introduce[d] for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. [¶] 'Sexual offense' means a crime under the laws of a state or of the United States that involves any of the follow[ing]: Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person. [¶] Contact, without consent, between the genitals or anus of the defendant and any part of another person's body. [¶] If you find that the defendant committed a prior sexual offense, you may but are not required to, infer that the defendant had a disposition to commit similar type sexual offenses. If you find that the defendant had this disposition you may, but are not required to, infer that he was likely to commit the crimes of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by

> itself to prove beyond a reasonable doubt that he committed the charged crimes. The weight and significance of this evidence, if any, are for you to decide. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

CALJIC No. 2.50.01 was drafted to instruct the jury as to how they are to consider evidence of prior sexual offenses admitted under Evidence Code section 1108 (discussed, *ante*). (*Falsetta, supra,* 21 Cal.4th at pp. 922-924.) The court in *Falsetta,* in rejecting the due process challenge to Evidence Code section 1108 (discussed, *ante*), specifically approved the language of CALJIC No. 2.50.01 as adequately setting forth "the controlling principles under [Evidence Code] section 1108." (*Falsetta, supra,* 21 Cal.4th at p. 924.) Nevertheless, Robinson still contends that CALJIC No. 2.50.01 violates the due process clauses of both the California and United States Constitutions as it allows a jury to convict a defendant based solely upon a prior offense. This contention is not well taken.

First, "it is improbable that the California Supreme Court would suggest an instruction 'adequately sets forth the controlling principles' for considering other crimes evidence, and then find the same instruction to be constitutionally defective." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1336 (*Brown*), quoting *Falsetta, supra,* 21 Cal.4th at p. 924.) Further, the language of CALJIC No. 2.50.01 does *not* allow conviction based solely upon prior criminal conduct as it specifically instructs the jury that evidence of a past sex crime "is not sufficient by itself to prove beyond a reasonable doubt that [Robinson] committed the charged crime in this case." (CALJIC No. 2.50.01 (1999 rev.).)

Indeed, four appellate courts have rejected due process challenges to CALJIC No. 2.50.01, and to No. 2.50.02, which is identical to No. 2.50.01 except that it applies to evidence of prior domestic violence. (*People v. Van Winkle* (1999) 75 Cal.App.4th 133, 142-145 (*Van Winkle*); *Brown, supra,* 77 Cal.App.4th at pp. 1334-1337; *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1061-1063 (*Regalado*); *Waples, supra,* 79 Cal.App.4th at pp. 1396-1398.)

In *Van Winkle,* the defendant molested the daughter of a woman he had lived with for a short period of time. At trial, the prosecution introduced evidence that the defendant had previously molested his own daughter and her cousin. In his defense, the defendant stated that the victims had fabricated their stories of alleged abuse. (*Van Winkle, supra,* 75 Cal.App.4th at pp. 136-138.) After the defendant was convicted of the charged offense, he appealed, contending that CALJIC No. 2.50.01 was unconstitutional. (*Van Winkle, supra,* at p. 142.)

In rejecting the defendant's appeal, the Court of Appeal noted that there are ultimate or elemental facts that prove the elements of a crime. In contrast, evidentiary or basic facts do not necessarily prove the elements of the crime. (*Van Winkle, supra,* 75 Cal.App.4th at p. 142.) The court reasoned that since proof of a prior sexual offense was an evidentiary or basic fact and not an element of the crime charged, proof of the prior offense did not lead to the elements of the charged crime. (*Id.* at p. 143.)

The court also noted that although inferences and presumptions often take a prominent position in the fact finding process, they do not infringe on the right to due process unless "they undermine the jury's responsibility in a criminal trial to find the

ultimate facts (i.e., the elements of the crime) beyond a reasonable doubt." (*Van Winkle, supra,* 75 Cal.App.4th at pp. 142-143.) In determining whether inferences or presumptions infringe on due process rights, courts must distinguish between mandatory presumptions, which encroach upon the reasonable doubt standard, and permissive presumptions, which leave the jury free to accept or reject the inference suggested by the record. (*Id.* at p. 143.) The court in *Van Winkle* then concluded that CALJIC No. 2.50.01 did not violate due process rights because it contained permissive, rather than mandatory inferences, that allowed, but did not require, the jury to find that the defendant was likely to commit, or did in fact commit, the charged crime. (*Van Winkle, supra,* at p. 143.) Because the inferences were permissive, the instruction did not dilute the prosecution's burden of proof to prove the charged crime beyond a reasonable doubt. (*Id.* at p. 144.)

In *Brown, supra,* 77 Cal.App.4th 1324, the court rejected a due process challenge to an instruction under CALJIC 2.50.02, which is identical to CALJIC No. 2.50.01 with the exception that it instructs the jury regarding its consideration of past acts of domestic violence, not sex crimes. The court rejected the defense argument that the instruction given allowed "the jury to infer that he committed the charged crime solely from proof that he committed the prior acts of domestic violence. To the contrary, the instructions expressly provided that 'evidence that the defendant committed prior offenses involving domestic violence is not sufficient by itself to prove that he committed the charged offenses.'" (*Brown, supra,* 77 Cal.App.4th at p. 1335.) Noting the California Supreme Court's approval of this language in *Falsetta, supra,* 21 Cal.4th 903, the court concluded that there was "no reasonable likelihood" that the jury believed that it could convict the

defendant solely based upon past acts of domestic violence. (*Brown, supra,* 77 Cal.App.4th at p. 1335.)

Robinson relies upon *People v. Vichroy* (1999) 76 Cal.App.4th 92 (*Vichroy*) to support his contention that CALJIC No. 2.50.01 violates due process principles, based upon its conclusion that CALJIC No. 2.50.01 allowed a jury to convict the defendant based solely upon their determination that he or she committed a prior sexual offense. However, this case interpreted the pre-1999 version of CALJIC No. 2.50.01. That version did not have the protective statement that evidence of a past sex crime "is not sufficient by itself to prove beyond a reasonable doubt that [Robinson] committed the charged crimes." Indeed, the *Vichroy* court noted with approval this added language to CALJIC No. 2.50.01. (*Vichroy, supra,* 76 Cal.App.4th at p. 100, fn. 6.) Accordingly, as this case analyzed the pre-1999 version of CALJIC No. 2.50.01, it does not support Robinson's contention that that jury instruction violates due process principles.

Based upon the guidance of *Falsetta, supra,* 21 Cal.3d 903, the protective language added by the 1999 revision to CALJIC No. 2.50.01, and the well reasoned authority concluding that the instruction does not allow a jury to convict a defendant based solely upon past acts, we conclude that CALJIC No. 2.50.01 does not violate Robinson's due process rights.

E. *Sufficiency of the Evidence*

Robinson contends that there is insufficient evidence to sustain his convictions on all counts. We reject this contention.

1. *Standard of review*

On an appeal contending there is insufficient evidence to support a verdict, we review the evidence in the light most favorable to the judgment and, in so doing, determine whether there is substantial evidence such that a rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) The reviewing court will presume in support of the trial court's judgment the existence of every fact the trier of fact could reasonably infer from the evidence. (*People v. Iniguez* (1994) 7 Cal.4th 847, 854.) The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on """isolated bits of evidence.'" [Citation.]" (*People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) "That the evidence might lead to a different verdict does not warrant a conclusion that the evidence supporting the verdict is insubstantial." (*People v. Holt* (1997) 15 Cal.4th 619, 669; *People v. Berryman* (1993) 6 Cal.4th 1048,1084, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800.)

Further, it is the exclusive function of the trier of fact to assess the credibility of witnesses. (*People v. Lopez* (1982) 131 Cal.App.3d 565, 571.) We will not "substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. McLead* (1990) 225 Cal.App.3d 906, 917.) Moreover, it is not our function to reweigh the evidence. (*People v. Perry* (1972) 7 Cal.3d 756, 785 (*Perry*), overruled on another ground in *People v. Green* (1980) 27 Cal.3d 1.) Thus, a judgment will not be overturned even if we might have made contrary

findings or drawn different inferences, as it is the jury, not the appellate court that must be convinced beyond a reasonable doubt. (*People v*. *Perez* (1992) 2 Cal.4th 1117, 1126.)

2. *Evidence on counts 1, 2 and 3*

Robinson asserts that there is insufficient evidence to support his conviction on counts 1 through 3 (rape, sodomy and rape with a foreign object). We reject this contention.

The direct testimony of the victims was adequate to prove counts 1, 2 and 3. Georgia T. testified that Robinson hit her on the head and then choked her until she passed out. He then removed her clothes. Robinson forced her face into the dirt and forced his penis into her vagina.

Brenda A. testified that Robinson hit her, placed his hand over her mouth and began choking her. He slammed her into a Dumpster, removed her clothes and pushed her face into the ground. Robinson told her to wet her anus and then spit on his finger and himself lubricated her anus with his finger. Robinson then sodomized her.

The corroborating evidence also supported the substantial evidence that Robinson committed the charged crimes. Georgia T.'s report to the nurse who examined her was consistent with her description of the assault. She was seen by a witness running naked and screaming for help on a freeway on-ramp.

Brenda A.'s description of her assault to the nurse who examined her was also consistent with her description of the rape. The findings of that nurse and the DNA evidence recovered from her also supported the fact that Robinson assaulted her.

Robinson points to weaknesses and purported contradictions in the evidence, including the lack of DNA evidence tying him to the rape of Georgia T. However, this is merely an attempt to ask this court to reweigh disputed evidence that the trier of fact resolved against him. We are bound by the jury's resolution of such factual disputes. (*Perry, supra,* 7 Cal.3d at p. 785.)

3. *Evidence on count 4*

Robinson also asserts that there is insufficient evidence to support his conviction on count 4 (furnishing cocaine base). We reject this contention.

Health and Safety Code section 11352, subdivision (a) provides in part:

> "[E]very person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance . . . shall be punished by imprisonment in the state prison for three, four, or five years."

The second amended information charged Robinson on count 4 as follows:

> "On or about November 27, 1999, REGAL ROBINSON did unlawfully sell, furnish, administer, and give away, and offered to sell, furnish, administer, and give away controlled substances, to wit: *cocaine base*, in violation of HEALTH AND SAFETY CODE SECTION 11352(a)." ((Italics added.)

The jury was instructed on count 4 that "[e]very person who sells, furnishes, or gives away *cocaine base*, a controlled substance, is guilty of a violation of Health and Safety Code section 11352, a crime." (Italics added.)

Robinson contends that the evidence is insufficient to support a conviction on the ground that he furnished cocaine base to Brenda A. because there was no expert

testimony that what she was provided was cocaine base, and her testimony only referred to the substance as "rock cocaine." This assertion is without merit. Unfortunately, given the degree to which "rock cocaine" or "crack cocaine" has become endemic in certain areas of this nation, it is common knowledge that such terms are the street names for and synonymous with cocaine base. Moreover, there was testimony that the drug supplied was in rock form and smoked, both of which are attributes of cocaine base. "'Cocaine base is not water soluble, concentrated in a hard rock-like form, and generally smoked.' [Citations.]" (*People v. Howell* (1990) 226 Cal.App.3d 254, 261.) Substantial evidence supports Robinson's conviction for furnishing cocaine base.

F. *Impeachment of Robinson's Testimony with Prior Convictions*

Robinson asserts that the court abused its discretion in allowing the People to impeach his testimony with evidence of his prior convictions for robbery and assault with a deadly weapon. We reject this contention.

1. *Standard of Review*

We review a court's decision to admit or exclude evidence of prior felony convictions to impeach a defendant's testimony under the abuse of discretion standard. (*People v. Clair* (1992) 2 Cal.4th 629, 655.) An abuse of discretion only occurs if the court's decision exceeds all bounds of reason. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

2. *Analysis*

Evidence Code section 788 allows cross-examination of witnesses as to prior felony convictions:

> "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . . ."

However, a defendant may only be impeached by evidence of felonies that involve "moral turpitude." (*People v. Castro* (1985) 38 Cal.3d 301, 317 (*Castro*).) Further, the court still retains the discretion to exclude evidence of a felony involving moral turpitude under Evidence Code section 352 (see fn. 8, *ante*) if its probative value is substantially outweighed by its prejudice. (*Castro, supra,* at pp. 308-312.)

The court here allowed Robinson's testimony to be impeached by evidence that he was convicted in 1991 for robbery and assault with a deadly weapon. Further, the court sanitized the assault conviction by omitting reference to the fact that Robinson used a knife in committing that crime.

Robinson does not deny that assault and robbery are both considered crimes of moral turpitude. (See *People v. Elwell* (1988) 206 Cal.App.3d 171, 177 [assault]; *Mayfield, supra,* 14 Cal.4th at p. 784 [robbery].) Rather, Robinson contends that the court erred in allowing impeachment with this evidence because the conviction for assault has less relevance for impeachment purposes because it does not involve dishonesty or theft. However, we conclude that the court's decision to allow this impeachment evidence did not exceed all bounds of reason.

Although it is true that "convictions which are assaultive in nature do not weigh as heavily in the balance favoring admissibility as those convictions which are based on dishonesty or some other lack of integrity" (*People v. Rist* (1976) 16 Cal.3d 211, 222, superseded by statute on another point), it is also true that "'[n]ot as heavily' does not, of

course, mean 'not at all.'" (*Castro, supra,* 38 Cal.3d at p. 315.) The court's decision to allow cross-examination regarding Robinson's conviction for assault was further bolstered by the court's minimizing its prejudicial impact by omitting the fact that Robinson used a knife in committing that crime.

Robinson also asserts that the assault with a deadly weapon and robbery convictions were overly remote in time, having been committed nine years prior to trial. However, they were not remote considering the fact that Robinson was in prison for those crimes until shortly before he committed the charged offenses. (*People v. Massey* (1987) 192 Cal.App.3d 819, 825.)

Robinson also asserts that the court erred in admitting the assault and robbery convictions because, due to their violent elements, they were similar to the charged offenses. (See *People v. Muldrow* (1988) 202 Cal.App.3d 636, 644-645.) However, although both the prior crimes and the charged offenses involved elements of violence, it cannot be argued that they involved the same or similar conduct. Therefore, there was no danger that the jury would infer that Robinson had the propensity to commit the present crimes because he had committed the same or similar crimes in the past. In sum, the court did not abuse its discretion by allowing Robinson's testimony to be impeached by evidence of his convictions for assault with a deadly weapon and robbery.

G. *Alleged Presentation of False Evidence/Withholding of Exculpatory Evidence*

Robinson asserts that the People presented false evidence at trial and also withheld exculpatory evidence. We reject these contentions.

Due process principles under both the state and federal Constitutions prevent prosecutors from presenting false evidence at trial and also require that they disclose exculpatory evidence material to a defendant's guilt or innocence. (*Giles v. Maryland* (1967) 386 U.S. 66, 74; *People v. Sakarias* (2000) 22 Cal.4th 596, 633; *Kyles v. Whitley* (1995) 514 U.S. 419, 433; *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.)

Here, after trial Robinson filed a motion for new trial, asserting that the People failed to turn over exculpatory evidence. Specifically, Robinson asserted that the People failed to turn over a complete copy of the report by paramedics who treated Georgia T. after Robinson raped her. In support of this contention, Robinson submitted a declaration stating that he only received the first page of the report and that the remaining pages of the report contained exculpatory evidence that he would have used at trial.

In opposition to this motion, the People submitted a counterdeclaration stating that the entire paramedic report was turned over to Robinson's original counsel.[13] The report was also provided to Robinson's advisory counsel[14] appointed after he elected to represent himself. Robinson did not provide any declarations from his attorneys as to whether they received the entire paramedic report.

The court denied Robinson's motion, finding that Robinson did not meet his burden of proof that the report was suppressed. The court noted that Robinson had filed nothing contradicting the People's statement the entire report had been turned over to his

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13 Tom Ochs.

14 Hodge Crabtree.

counsel. The court also found that Robinson had equal access to the report and could have obtained it on his own, but chose not to do so. Finally, the court found that nothing in the report was exculpatory, and, in fact, a competent defense attorney would probably not use it at trial due to its description of "the serious and brutal nature of the attack and rape."

On appeal, Robinson not only renews his claim that the People failed to turn over exculpatory evidence, but also that the People allowed Georgia T. to testify falsely because some of her testimony at trial conflicted with information in the report.[15] However, Robinson does not explain how he can escape the fact that his counsel stated under oath that they received the entire paramedic report. Robinson also fails to address the court's finding that he had equal access to the report and could have obtained it himself. The record and the trial court's findings in this matter dispel Robinson's assertions of a violation of his due process rights. (*People v. Soto* (1998) 64 Cal.App.4th 966, 981-982.)

Nor is there any merit to Robinson's assertion that the People knowingly allowed a witness, Georgia T., to testify falsely. Robinson supports this assertion by pointing to contradictions between Georgia T.'s statements to police and the paramedics' report (see fn. 15, *ante*). However, any contradictions are merely the subject of cross-examination

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15 The report reflects that Georgia T. told paramedics that she was repeatedly raped for three hours and never lost consciousness, while at trial she testified that she fought with Robinson for three hours and did lose consciousness. Further, she told paramedics that she was hit in the face and head and choked. Robinson claims this is contradictory to the nurse's examination, which disclosed no visible choke marks.

and impeachment by Robinson and do not constitute the presentation of false testimony by the People.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.